RECORD AND BRIEF

Supreme Court, U.S.
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No. 16-349

IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Santander contends that petitioners' claim of an important circuit conflict depends on conflating the definitions of a "debt collector." Specifically, it argues that this case concerns only a debt buyer that "regularly collects" debts (the second definition), as opposed to debt buyers whose "principal purpose" is debt collection (the first definition). It then claims that only two courts of appeals have decided whether purchasers of defaulted debt are covered by the second, "regularly collects" definition and both have held that they are not. BIO 1. At the same time, Santander tries to suggest that the first definition answers any concerns about debt buyers abusing consumers because collecting defaulted debt is the "principal purpose" of the worst debt buyers and because the first definition might apply even if the debt is owed to the collector. BIO 3. These arguments fail.

First, Santander simply mischaracterizes the decisions in the circuit conflict. The majority view in the circuits is that a company that "regularly collects" purchased defaulted debt is a "debt collector" subject to the FDCPA.

Second, there is no assurance that the "bad" debt purchasers will be subject to FDCPA regulation in the Fourth Circuit under the first definition of a "debt collector." Indeed, defendants whose "principal purpose" is the collection of defaulted debt have argued elsewhere that even if they fall within the first definition, they are not covered. Specifically, consistent with the decision below, they argue that having purchased the debt, they are the persons "to

whom a debt is owed," 15 U.S.C. § 1692a(4), and are therefore creditors exempt from the Act. *See, e.g.*, *FTC v. Check Investors, Inc.*, 502 F.3d 159, 172 (3d Cir. 2007). Nothing in the Fourth Circuit's decision holds otherwise.

In the end, coverage of "principal purpose" collectors turns on the same basic questions raised in "regularly collects" cases and posed by this petition. *See id.* This Court should grant the petition and thereby resolve the Act's coverage for both kinds of defendants.

I. Certiorari Is Warranted To Resolve The Circuit Conflict.

A. The Circuit Conflict Is Real.

The circuit conflict over the Question Presented is acknowledged by courts,[1] the federal government,[2] commentators,[3] and even the Chamber of Commerce.[4] Santander's effort to prove them all wrong is unconvincing.

1. ***Seventh Circuit.*** We begin with respondents' most far-fetched claim – that the law of the Seventh Circuit is "not in any real conflict with the decision below." BIO 14.

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[1] Pet. App. 12a.

[2] *See* Pet. 17.

[3] *See, e.g.*, Jolina Cuaresma, Katherine Lamberth, and Brent Yarborough, *Do You Think Banks Are Debt Collectors? The CFPB and the FTC Do*, ABA BUS. L. TODAY 1, 2 (Oct. 2016).

[4] Br. Chamber of Commerce, *Midland Funding, LLC v. Johnson* 7 & n.2, No. 16-348.

The defendant in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009), made the same basic argument the Fourth Circuit accepted in this case, claiming it was "a creditor and not a debt collector because it purchases delinquent debt thereby becoming one 'to whom a debt is owed' under § 1692a(4)." *Id.* at 796; *see* Pet. App. 14a. The Seventh Circuit held that this "argument is foreclosed by our precedents." *Id.* Because "the debts at issue in this case were already in default when it acquired them," the court's decisions in "*Schlosser* [*v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003)] and *McKinney* [*v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008)] compel the conclusion that Triumph Partnerships is a debt collector under the FDCPA and is, therefore, subject to its provisions." *Id.* at 797.

Santander suggests that *Ruth* could have been decided on another ground. BIO 17 (stating that opinion "suggest[ed]" the defendant "may have" qualified under the first definition). But that manifestly was not the actual basis for the decision. And, in any event, *McKinney* applied the same rule to a defendant that unambiguously fell only under the second definition. *See* 548 F.3d at 502.

Given *Ruth*'s clarity, Santander's attempts to distinguish earlier circuit precedent are beside the point. They are also meritless. Santander says that the extended discussion of the Question Presented in *Schlosser* was dicta and points out that Judge Manion agreed with that position in *McKinney*. BIO 15-16. But the *majority* in *McKinney* took the opposite view. *See* 548 F.3d at 501. Santander is then forced to claim that the *McKinney* majority's

conclusion is dicta because the court went on to find that the debt collector did not violate the FDCPA. BIO 17. But that just means the court issued two alternative holdings. And "alternative holdings . . . are still entitled to precedential weight." *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001).

2. ***Third Circuit.*** Santander similarly argues that *Check Investors* "turned on the Act's *first* definition of 'debt collector'" and the Third Circuit therefore had no occasion to decide the critical question under the second definition – *i.e.*, "what it means for a debt to be 'owed or due . . . another.'" BIO 14. But *Check Investors* discussed the "owed . . . another" phrase, and its parallel language in the definition of a "creditor," at length. *See* 502 F.3d at 171-73. It did so because the defendant argued that regardless of whether it qualified as a "debt collector" under the definition of that term, it nonetheless would be exempt from FDCPA coverage if it qualified as a "creditor." *Id.* at 172. The Third Circuit addressed that argument by interpreting the statute as a whole, including both the "debt collector" and "creditor" definitions, as well as their parallel exceptions. *Id.* at 172-74. Its conclusion established the law of the Third Circuit on the question presented by the petition, holding that "one attempting to collect a debt is a 'debt collector' under the FDCPA if the debt in question was in default when acquired," while "an entity is a creditor if the debt it is attempting to collect was not in default when it was acquired." *Id.* at 173.

Courts in the Third Circuit have applied this test to all debt purchasers, including consumer-finance

companies. For example, in *Oppong v. First Union Mortgage Corp.*, the plaintiff sued Wells Fargo, which had acquired the plaintiff's mortgage after it had gone into default. 215 F. App'x. 114, 115-116 (3d Cir. 2007). The court acknowledged that "Wells Fargo is not an entity whose 'principal purpose' is to collect others' debt." *Id.* at 118. But it held that the statutory definition "does not exclude an entity in Wells Fargo's position who has acquired a debt that was already in default." *Id.*; *see also, e.g., Loveless v. Bank of America, N.A.*, No. 13-cv-1546, 2014 WL 4437576, at *8-*9 (M.D. Pa. Sep. 9, 2014) (applying circuit rule to Bank of America); *DeHart v. U.S. Bank, N.A. ND*, 811 F. Supp. 2d 1038, 1056 (D.N.J. 2011) (same for U.S. Bank).

Indeed, because the *Check Investors* test applies to all debt purchasers in the Third Circuit, courts there regularly fail even to ask whether collecting defaulted debts was the defendant's principal business or only a regular part of its activities. *See Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 358 n.2 (3d Cir. 2015); *Hoen v. FCC Finance, LLC*, 126 F. Supp. 3d 472 (D.N.J. 2015); *Veras v. LVNV Funding, LLC*, No. 13-1745, 2014 WL 1050512, at *2-*3 (D.N.J. Mar. 17, 2014).

3. ***Sixth Circuit***. Santander likewise cannot deny that in *Bridge v. Ocwen FederalBank, FSB*, 681 F.3d 355 (6th Cir. 2012), the Sixth Circuit expressly embraced "the holdings of other circuits" that "[f]or an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the

time it was acquired." *Id.* at 359 & n.3 (citing *Check Investors* and *Schlosser*).

Instead, Santander argues the analysis was dicta because the case was resolvable on another ground, namely that there was no valid assignment of the debt. BIO 14-15. While the court did note that allegation in the complaint, it did not rest its decision on that ground alone. *See* 681 F.3d at 360 (explaining that Complaint also alleged that claimed debt "was already in default at the time [defendants] obtained it"). It later stated its holding in unambiguous terms: "Therefore, we hold that the definition of debt collector pursuant to § 1692a(6)(F)(iii) includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition." 681 F.3d at 362.

Santander may complain that the Sixth Circuit could have written a narrower opinion, but it cannot reasonably deny that this holding established the law of the circuit on the Question Presented, including for consumer-finance companies like Santander. *See, e.g.*, *Dahl v. First Franklin Loan Servs.*, No. 13-13599, 2014 WL 6686769, at *5-*6 (E.D. Mich. Nov. 26, 2014) (Bank of America debt collector under *Bridge* test); *Bridge v. Ocwen Fed. Bank*, No. 7-cv-2739, 2014 WL 2442183, at *7-*9 (N.D. Ohio May 30, 2014) (same for Deutsche Bank); *Castellanos v. Deutsche Bank*, No. 11-cv-815, 2012 WL 2684968, at *6-*8 (S.D. Ohio July 6, 2012) (same).

4. ***Fifth Circuit***. Santander briefly argues that the Fifth Circuit intended its invocation of the majority rule in *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), as simply a rendition of the

legislative history. BIO 18-19. But *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717 (5th Cir. 2013), makes clear the Fifth Circuit treats *Perry* as establishing a real precedent. *Id.* at 722. The court further eliminated any ambiguity by "expressly adopt[ing]" the Third Circuit's rule to the same effect. *See id.* at 722 n.5.

* * * * *

There is no prospect that this conflict will resolve itself without this Court's intervention. Courts in the majority camp have fully engaged the simplistic "plain language" argument Santander advances and the Fourth and Eleventh Circuits embraced. *See, e.g.*, *Check Investors*, 502 F.3d at 172-73; *Schlosser*, 323 F.3d at 536. And courts on both sides of the divide have denied petitions for rehearing en banc. *See* Pet. 18; *McKinney*, *supra* (rehearing denied Dec. 30, 2008); *Schlosser*, *supra* (rehearing denied Apr. 16, 2003). Finally, neither party believes that an agency could resolve the conflict. *See* Pet. 18; BIO 30.

B. The Question Presented Is Important.

Santander does not contest that the petition presents a recurring question that can determine the outcome of important litigation. Indeed, as the citations above reflect, the question arises with great frequency. *See also* Michael A. Rosenhouse, *What Constitutes "Debt Collector" for Purposes of Fair Debt Collection Practices Act (15 U.S.C.A. § 1692a(6))*, 173 A.L.R. Fed. 223 §§ 3-4, 8.2, 16 (originally published 2001) (collecting many more cases). That is reason enough to resolve the split.

Santander argues that the question is unimportant because the worst abusers of defaulting

consumers are companies whose principal purpose is collecting purchased debt. And, it tries to assure the Court, those defendants will be subject to the Act regardless of the outcome of the Question Presented. BIO 3, 23. But that confidence is unwarranted. As noted, "principal purpose" debt collectors argue that they are exempt creditors because, as the Fourth Circuit concluded, they are the entities "to whom a debt is owed" and are collecting on their own account not collecting debts "for another." 15 U.S.C. § 1692a(4); *see* Pet. App. 8a, 19a. Santander makes the same suggestion in its vehicle objection. BIO 21-22. Certainly, the Fourth Circuit's decision does not hold otherwise.

In any event, even if the Question Presented governed only consumer-finance companies like Santander, it would warrant review. *See* FTC Amicus Br. Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015). As this case and the cases cited above indicate, many consumer-finance and other companies regularly purchase defaulted debt in addition to their other lines of business. In fact, the company identified by the Federal Trade Commission as the largest purchaser of defaulted debt in 2013, Sherman Financial Group LLC, advertises itself as engaging in a broad range of financial services.[5]

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[5] *See* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, at tbl.1 (2013); *Investment History*, Sherman Financial Group, http://www.sfg.com/home/inner/.

Whether consumers subject to collection efforts by these companies are protected by the FDCPA should not vary from circuit to circuit.

Finally, Santander claims uniform application of the FDCPA is of no importance to its industry because debt collectors are already subject to potentially conflicting state laws. BIO 24-25. But a leading debt purchaser recently told this Court otherwise, explaining that "the existence of disparate [FDCPA] rules in different circuits governing the same conduct is of significant practical importance for institutional creditors" and is "particularly untenable for nationwide entities." Pet. 16, 17, *Midland Funding, LLC v. Johnson*, No. 16-348. This Court granted the petition. *See* 137 S. Ct. –, 2016 WL 4944674 (Oct. 11, 2016).

II. Santander's Vehicle Objection Is Meritless.

Santander says that resolving the Question Presented will not decide this case because petitioner allegedly conceded Santander is a creditor in the district court. BIO 2. Not so.

Santander points to the district court's cryptic statement that it "cannot ignore Plaintiffs' failure to properly address the applicability of the § 1692(a)(4) assignee exception." BIO 21 (citing Pet. App. 33a). Whatever that means, it is not a finding of any concession or waiver, as demonstrated by the fact that the court engaged in a full analysis of the assignee exception. *See* Pet. App. 30a-33a. In fact, petitioner *did* address the assignee exception, while focusing on the definition of "debt collector," a focus the Fourth Circuit ultimately agreed was correct. *See* Plaintiffs' Opp. to MTD 5, 7, ECF No. 15; Pet.

App. 15a. When Santander tried to argue waiver on appeal, petitioner explained what happened to the Fourth Circuit, Pet. C.A. Reply Br. 14 n.4, which notably found no concession or waiver.

Santander also notes in passing that the district court stated that there was "no indication" that "Santander acquired the debt 'solely for purpose of collection" rather than "servicing." BIO 21-22 (quoting Pet. App. 33a). But as the Fourth Circuit explained, the Complaint plainly alleged otherwise, Pet. App. 16a. Santander likewise admits in this Court that it purchased the debts for collection. BIO 3.[6]

III. The Fourth Circuit Decision Is Wrong.

Santander's defense of the decision below on the merits also provides no basis to deny cert.

Santander says it is obvious that debt purchasers are not attempting to collect debts "owed . . . another." BIO 25. But the definitional provision must be read as a whole, including its exclusion of those collecting a debt "which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The Fourth Circuit's interpretation does more than simply ignore a "negative inference"

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[6] The Complaint did allege that Santander originally acquired the debts for servicing, before purchasing the accounts. Complaint ¶ 47. The Fourth Circuit rejected petitioners' argument that because the debts were in default at the time of the initial contract for servicing, Santander was a debt collector at the outset and remained one even after buying the debt. Pet. App. 16a; BIO 22.

arising from this exclusion. BIO 27. It renders the exclusion completely surplusage. On the Fourth Circuit's reading, anyone who qualifies for the exemption because it "obtained" a debt prior to default has no need of the exemption because it would not qualify as a "debt collector" under the main definition anyway (because the debt would be owed to the company that obtained it, not to "another"). *See* Pet. 24-25.

Santander's only answer is suggest debt servicers might be able to "obtain" a loan without "own[ing it] outright." BIO 28. "Obtainment," Santander says, "can denote mere possession, not ownership." *Id.* But Santander never explains what it means to merely "possess" a debt. A debt is a contractual obligation, not a physical thing. One who obtains a debt through assignment obtains the right to enforce the contractual rights, extinguishing the assignor's rights. *See* Restatement (Second) Contracts § 317(1); *see also id.* ill. 1 ("A has a right to $100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive $100.").

Santander also fails to distinguish itself from the debt servicers it admits are subject to the FDCPA if they are assigned a debt after it has gone into default. *See* BIO 29. Debt servicers and purchasers "obtain" debts in exactly the same sense because they obtain the debts through precisely the same way, through an assignment. *See* Pet. App. 15a-16a; 15 U.S.C. § 1692a(4). Yet Santander argues that purchasers of defaulted debt are never debt collectors, while servicers of defaulted debt are. How

that view can be squared with the statute's language and purposes, Santander cannot say.

Is it thus easy to see why no court has accepted Santanders' novel argument, and why the only courts of appeals to have accepted Santander's bottom-line position have done so by simply ignoring the surplusage their interpretations create.

The majority of circuits properly conclude instead that:

> [f]or those who acquire debts originated by others, the distinction drawn by the statute – whether the loan was in default at the time of the assignment – makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collection practices, effectively the same as that between the originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection.

Schlosser, 323 F.3d at 538.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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